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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

LENOX HILL HOSPITAL, A NEW YORK NOT-FOR-PROFIT CORPORATION,

Petitioner,

—v.—

AMIR MANOCHERIAN, ROSITA MANOCHERIAN, ALAN MANOCHERIAN, ROBERT MANOCHERIAN, and BARBARA MANOCHERIAN, d/b/a FAME COMPANY, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

PETITION FOR A WRIT OF CERTIORARI

EDWARD S. KORNREICH
Counsel of Record
CHARLES S. SIMS
MARK P. MONACK
Proskauer Rose Goetz & Mendelsohn LLP
1585 Broadway
New York, New York 10036
(212) 969-3000

Counsel for Petitioner

QUESTIONS PRESENTED

1. May one who purchases an apartment building while it is subject to statutory rent stabilization challenge the law that maintains that regulatory regime under the Takings Clause, years later, without any showing of economic loss or unjust compensation?

2. Is economic legislation that does not effect a physical taking subject to the close causal nexus scrutiny required under *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), and *Dolan v. City of Tigard*, 114 S. Ct. 2309 (1994), for *ad hoc* permit conditions that do effect a physical taking?

3. Does the Takings Clause authorize the invalidation of economic regulations without any showing of economic loss or assessment of "just compensation," upon nothing more than a *Lochner*-like determination that the regulatory statute does not substantially advance a legitimate state interest? If the answer to that question is no, did the Court of Appeals' invalidation of a rent stabilization statute in this case exceed the authority afforded by the Takings Clause?

LIST OF PARTIES

In addition to those listed on the cover, respondents include the State of New York, which appeared in the state courts as an intervenor to defend the statute whose validity was called into question and which is filing its own petition for certiorari, and T. O'Connor, C. Rogers, D. Huczel, K. Moore, N. Kolan and I. Liebel, the nurses occupying the apartments under the Lenox Hill leases, who were designated as additional defendants below, although they did not participate or appear by counsel.

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IN THE SUPREME COURT OF THE UNITED STATES
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LENOX HILL HOSPITAL, A NEW YORK NOT-FOR-PROFIT CORPORATION, *Petitioner,*

—v.—

AMIR MANOCHERIAN et al., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE NEW YORK COURT OF APPEALS

OPINIONS BELOW

The opinion of the New York Court of Appeals is published at 84 N.Y.2d 385 (1994), and is reprinted in the appendix below ("Pet. App.") at 3a. The Order of the Court of Appeals is reprinted at Pet. App. 44a. The Order of the Supreme Court of New York, Appellate Division, dismissing the complaint, is published at 196 A.D.2d 728 (1st Dep't 1993), and is reprinted at Pet. App. 46a. The opinion of the Supreme Court of New York, New York County, on motions and cross-motions for summary judgment, in favor of defendants, is published at 154 Misc. 2d 982 (Sup. Ct. N.Y. Co. 1992), and is reprinted at Pet. App. 59a.

JURISDICTION

The New York Court of Appeals issued its opinion on October 20, 1994, and Justice Ginsburg has extended the time for Lenox Hill to file this petition to March 20, 1995. *See* Pet. App. 1a, 2a. This Court has jurisdiction under 28 U.S.C. § 1257(a)(1994). The decision is final within the meaning of § 1257(a), since the New York Court of Appeals has conclusively invalidated a state statute as violative of the Takings Clause of the United States Constitution and thereby finally deprived petitioner

of its rights under the state law. *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 477-83 (1975); *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 309 (1987).[1]

STATUTES INVOLVED

The Fifth Amendment provides, in pertinent part, ". . . nor shall private property be taken for public use, without just compensation."

Section 41(a) of the Omnibus Housing Act of 1983, 1983 N.Y. Laws ch. 403, which is reprinted at Pet. App. 72a-74a, provides, in pertinent part:

> [The Rent Stabilization Laws apply to] Class A multiple dwellings not owned by a co-operative or as a condominium . . . containing six or more dwelling units which:
>
> (1) were completed after February 1, nineteen hundred forty seven, except dwelling units . . . (f) not occupied by the tenant, not including sub-tenants or occupants, as his

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[1] Unlike eminent domain challenges brought by property owners, which are not final until the state court addresses both the taking and just compensation questions, *see Cox Broadcasting*, 420 U.S. at 477 n.6 (citation omitted), in this case the plaintiff-landlord sued the tenant seeking only a declaration that tenant had no right to renewal leases, asserting that the statute under which tenant claimed those rights violated the Takings Clause.

The state court decision striking the statute and granting that relief is entirely final insofar as petitioner's rights under the now-invalidated statute are concerned. No question of compensation was pleaded or remains to be tried. The complaint did not seek compensation from the state, the state was not a party (except to defend the constitutionality of the statute under New York Executive Law § 71), and jurisdiction over such a claim would have been available only in the New York Court of Claims. New York Court of Claims Act § 9.2.

> primary residence, as determined by a Court of competent jurisdiction. . . .

Section 64 of the Omnibus Housing Act of 1983, reprinted at Pet. App. 73a-75a, states, in relevant part, "[Section] forty-one . . . shall take effect April first, nineteen hundred eighty-four . . ."

Chapter 940, 1984 N.Y. Laws ch. 940, approved August 6, 1984, which is reprinted at Pet. App. 76a-77a, provides in relevant part:

> notwithstanding the provisions of section two hundred twenty-six-b of the real property law, a not-for-profit hospital shall have the right to sublet any housing accommodation leased by it to its affiliated personnel without requiring the landlord's consent to any such sublease and without being bound by the provisions of subparagraphs (b), (c) and (f) of this paragraph. Commencing with the effective date of this subparagraph, whenever a not-for-profit hospital executes a renewal lease for a housing accommodation, the legal regulated rent shall be increased by a sum equal to fifteen percent of the previous lease rental for such housing accommodation, hereinafter referred to as a vacancy surcharge, unless the landlord shall have received within the seven year period prior to the commencement date of such renewal lease any vacancy increases or vacancy surcharges allocable to the said housing accommodation.

Section 5 of Chapter 940, Pet. App. 79a, provides in relevant part that "[t]his act shall take effect immediately and shall apply to all actions or proceedings pending on the effective date of this act. . . ."

STATEMENT OF THE CASE

1. Lenox Hill Hospital ("Lenox Hill" or "the hospital") is a not-for-profit acute-care teaching hospital located in the heart of Manhattan's Upper East Side, at Park Avenue and East 77th Street, an area with among the highest rents in the nation.[2] Because being able to ensure that medical staff can get to the hospital at all hours is important to the well-being of its patients, the hospital sought moderate-cost employee housing in the vicinity of the hospital. To this end, Lenox Hill, like many hospitals in New York City, began renting apartments for use by its employees in the 1960's.

Lenox Hill originally leased eighteen apartments in the 108-unit building at 420 East 79th Street (the "Building") prior to 1969. It was understood by the parties that the apartments are to be occupied by nursing personnel employed by Lenox Hill. All of the apartments became subject to the rent stabilization laws ("RSL") on May 6, 1969. When the Manocherians, doing business as Fame Company ("Landlord"), purchased the Building in 1976, the leases to Lenox Hill were in effect and subject to the RSL, and the market price for the Building would have reflected this fact. From the time Landlord purchased the Building in 1976, through 1983, Landlord and Lenox Hill had no material disputes as to possession of the apartments.

Under the basic protections of New York's rent-stabilization laws as they existed from 1969 to 1983, tenants in most apartments in multiple dwellings in Manhattan (and specifically in the building at issue here) were entitled to renewal leases, and landlords' ability to increase annual rents was restricted to city-wide percentage increases set administratively from time to time, with an additional limited increase available upon the death or departure of a tenant. A long line of cases in New York had previously held that a corporation could lease rent-stabilized apartments for the use of their employees and obtain renewal

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[2] Lenox Hill has no parents or subsidiaries.

leases. *See, e.g., Cale Dev. Co. v. Conciliation & Appeals Bd.*, 61 N.Y.2d 976 (1984).

In 1983, the legislature of the State of New York enacted the Omnibus Housing Act ("OHA") to take effect on April 1, 1984. Among other things, the OHA was intended to correct two undesired consequences that have arisen from the unfettered ability of rent-stabilized tenants to sublet their apartments: 1) some absentee tenants were profiteering by subletting rent-stabilized apartments at market rates; and 2) some absentee tenants were "warehousing" their apartments to preserve their potential right to purchase at "insider" prices should the apartment become subject to a cooperative or condominium conversion plan.

To avert these unwelcome events, the OHA imposed several restrictions on a tenant's right to sublet rent-stabilized apartments. Most relevant to this case is the requirement that the tenant of record on the lease maintain the apartment as the tenant's "primary residence."

As soon appeared after enactment, however, the "primary residence" language unintentionally made unclear whether a corporation, which as a fictional person could not occupy any apartment as a primary residence, could lease rent-stabilized apartments on behalf of its employees if those individuals were not specifically named in the lease.

Although Lenox Hill does not believe that the OHA affected corporate tenancies, in an excess of caution the legislature of the State of New York enacted Chapter 940 of the Laws of 1984 ("Chapter 940"). Only four months and five days after the effective date of the OHA, in the very next session of the legislature, the ability of not-for-profit hospitals such as Lenox Hill to rent apartments for the benefit of nurses was definitively preserved. Chapter 940 expressly authorized not-for-profit hospitals to lease rent-stabilized apartments on behalf of "affiliated personnel" without the owner's consent and without time limitation. In return, landlords were allowed an additional fifteen percent rent

increase on the first lease entered into after the adoption of Chapter 940 and an additional fifteen percent rent increase every seven years thereafter. Chapter 940 thus made it clear that not-for-profit hospitals such as Lenox Hill retained the rights they had enjoyed as rent-stabilized tenants from the inception of the RSL in 1969, subject to the payment of periodic fifteen percent increases at the request of the landlord over and above the increases available to all landlords of rent-stabilized apartments.

2. On or about September 25, 1991, Landlord brought an action in the Supreme Court, New York County, with respect to five of the apartments, seeking, *inter alia*, a declaration that Lenox Hill was not entitled to renewal leases for the apartments on the ground, *inter alia*, that Chapter 940 violated the Takings Clause of the Fifth Amendment of the Constitution. Landlord initiated another action on or about January 3, 1992, with respect to the sixth apartment. These actions were consolidated by stipulation of the parties into the present litigation, and the state intervened to defend the state statute.

Landlord moved for summary judgment declaring Chapter 940 to be unconstitutional as both a physical and a regulatory taking. The Hospital and the State of New York cross-moved for summary judgment, and their motion was granted. Pet. App. 70a. The trial court rejected Landlord's contention that Chapter 940 created a physical taking, relying on this Court's decision in *Yee v. City of Escondido*, 503 U.S. 519, (1992), and Landlord has since abandoned that argument.

The Court also held that Landlord failed to establish that Chapter 940 constituted a regulatory taking, finding that Chapter 940 substantially advances legitimate state interests and does not deny Landlord economically viable use of its property:

> A principal goal of the rent stabilization law is to curb oppressive conduct and profiteering by landlords . . . That goal is advanced by providing protection to Lenox Hill and its employees. A Landlord should not be

permitted to rent its premises to a non-profit entity such as Lenox Hill and then be heard to complain that it had not foreseen the occupancy of the property by the very persons intended by the lease to occupy the premises. Further, Chapter 940 promotes the general health and welfare of the public that the Rent Stabilization Law, which addressed the housing shortage in the city, was designed to protect. During what is considered to be a continuing emergency in the residential rental market, the legislation permits non-profit hospitals to obtain housing for medical personnel which might not otherwise be available. There is no question but that the apartments are in fact rented to hospital employees. Thus, it is ultimately residential tenants who are being protected. Consequently, I find a sufficiently "close nexus" between the regulation and the end sought to be accomplished by the Rent Stabilization Law.

As previously indicated, the Omnibus Housing Act of 1983 was enacted, in part, to prevent tenant profiteering. Lenox Hill is not using the apartments to make a profit. Therefore it is reasonable for the legislature to exempt nonprofit hospitals such as Lenox Hill from the 1983 restrictions.

Consequently, I find that plaintiffs have failed to demonstrate that Chapter 940 does not further the purposes of the Rent Stabilization Law and that, in fact, the legislation does substantially promote legitimate state interests.

Pet. App. 68a-69a (citations omitted).

The lower court also held that plaintiffs had failed to show that they had suffered any economic loss as a result of the enactment of Chapter 940:

> There has been no showing that the value of any reversionary interest in a rent stabilized apartment is substantially less when the tenant is a not-for-profit hospital as opposed to an individual. * * * Further, plaintiffs did not invest in this property with the expectation of selling the units. . . . They are not presently seeking to sell the apartments, but to rerent them. Plaintiffs purchased the building with knowledge of Lenox Hill's leases and prior to the enactment of the Omnibus Housing Act of 1983. Chapter 940 was passed shortly after the 1983 legislation went into effect. The brief period of time between the enactment of the 1983 and 1984 laws was insufficient to give rise to any reasonable expectation of recovering the apartments.

Pet. App. 69a. (citations omitted)

On Landlord's appeal, the Appellate Division affirmed the order and reasoning of the Supreme Court of New York over two dissents. Pet. App. 46a.

On appeal to New York State Court of Appeals, after argument, and then reargument with two judges sitting by designation from the intermediate appeals courts to replace two judges who had recused themselves, a divided Court of Appeals held that Chapter 940 was unconstitutional. Pet. App. 4a.

The majority recognized that a statute may be invalid under the Takings Clause if it denies an owner economically viable use of his or her property (Pet. App. 7a), but it did not proceed under that standard. Instead, it proceeded under the purported rule that a Takings Clause violation is fully made out if a statute "does not substantially advance legitimate state interests," without any

inquiry into whether the property owner has suffered economic loss or has been justly compensated. Pet. App. 7a.

The Court of Appeals invalidated Chapter 940 for "not substantially advancing a closely and legitimately connected state interest." Pet. App. 4a. The Court did not consider whether the rent increases afforded by Chapter 940 amounted to "just compensation," and indeed did not consider whether any property interest the Landlord ever owned was harmed (*i.e.*, ignoring the threshold requirement that the plaintiff demonstrate some economic loss). Pet. App. 8a. In the Court's view, having proceeded under the "does not advance substantially legitimate state interests" standard set forth in *Nollan v. California Coastal Comm'n*, 483 U.S. 825 (1987), there was no occasion to inquire in any way whether the landlord had ever lost anything, and indeed no occasion to inquire whether, in view of the additional increases that the legislation afforded to landlords of such apartments, the landlord had anything taken *without just compensation*. Pet. App. 8a.

The Court applied the "close causal nexus" test of *Dolan v. City of Tigard*, ___ U.S. ___, 114 S. Ct. 2309 (1994), even though that test was expressly designed for use in the context of *ad hoc* permit requirements. By applying that test to a legislative enactment, the Court was able to engage in a *Lochner*-like analysis of whether Chapter 940 sufficiently advanced "legitimate" state interests for the legislature's handiwork to be upheld.

The Court's analysis of the legitimate state interest advanced by Chapter 940 is contradictory as well as arbitrary. In defining the state interest intended to be advanced by the legislation, the Court first stated that it would look at Chapter 940 in isolation from the rest of the Rent Stabilization Law: "That law, . . . must meet the constitutional safeguards on its own merits, not as an augmentation or complement to some generalized State interest found elsewhere in organic law or other statutes." Pet. App. 10a. The Court then rejected the specific interests offered by the State Attorney General and defendant Lenox Hill Hospital and

invalidated the law as not advancing the legitimate state interests of the Rent Stabilization Laws as a whole:

> We conclude that the peripheral and generalized State interests offered as justification for the regulatory mandates of Chapter 940 fail to sustain the legislation, as constitutionally required for such State action. They are not closely or legitimately connected to the long-established and recognized goals of the RSL and ETPA, which seek to ameliorate the emergency housing shortage.

Pet. App. 13a.

Judge Levine's dissent pointed out the various respects in which the Court of Appeals' decision contravened this Court's takings jurisprudence. Judge Levine noted that in regulatory takings jurisprudence there has always been a requirement that a challenger of a statute under the Takings Clause of the constitution must first show that they have suffered an economic loss as a result of the statute. Pet. App. 19a-22a. After analyzing the history of takings jurisprudence from *United States v. Causby*, 328 U.S. 256 (1946), to *Lucas v. South Carolina Coastal Council*, ___ U.S. ___, 112 S. Ct. 2886 (1992), Judge Levine found that plaintiffs had failed to meet their burden in an as-applied regulatory taking case of showing "with a modicum of definiteness that they sustained *some significant loss of value in their apartment building as a whole* because of the application of Chapter 940." Pet. App. 20a (emphasis added).

Additionally, Judge Levine pointed out that the majority had inappropriately applied to statutory economic legislation the takings standard crafted for cases where an administrative agency imposes permit conditions that accomplish what, if undertaken directly, would have amounted to a physical taking. *See Dolan*, 114 S. Ct. 2309. Judge Levine pointed out that *Dolan* expressly limits its imposition of the "essential nexus" test to cases

involving administrative adjudicatory imposition of suspect conditions of physical occupation. Pet. App. 29a-32a.

Finally, Judge Levine found that the majority determined that Chapter 940 did not substantially advance a legitimate state interest only after improperly rejecting the legitimate purposes proffered by Lenox Hill and the State of New York:

> Even under the heightened judicial scrutiny standard applied by the majority, a court is not permitted to pick and choose among the express purposes of legislation in employing the test of whether the requisite connection exists between the particular regulation and the problems the Legislature sought to ameliorate. Nor does strict scrutiny require that a regulation serve *all* of the legitimate State interests the Legislature sought to advance by the statutory scheme.

Pet. App. 25a. Judge Levine would have found that Chapter 940 substantially advanced the legitimate state interest in preventing unwarranted and abnormal rent increases, in preventing profiteering and speculation by landlords, in maintaining adequate nearby nursing staff residences in the face of artificially inflated market rents, and protecting not-for-profit hospitals from market dislocation. Pet. App. 26a.

Judge Ciparik's separate dissent pointed out another legitimate purpose which Chapter 940 substantially advanced, and which the majority refused to consider (Pet. App. 40a):

> Chapter 940 ensures Lenox Hill will continue to receive those benefits of the RSL it currently extends to its employee-subtenants, who then escape the perils of the rental market as an incidence of employment.

As demonstrated below, in order to correct the Court of Appeals' misinterpretations of the Takings Clause of the

Constitution of the United States, to resolve the several conflicts that misinterpretation created, and to prevent *Nollan* and *Dolan* from being mistakenly interpreted as *Lochner* reincarnate, the Supreme Court should grant this petition for a writ of certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE NEW YORK DECISION CONFLICTS WITH DECISIONS HOLDING THAT PLAINTIFFS WHO CANNOT SHOW ECONOMIC LOSS MAY NOT CHALLENGE ECONOMIC REGULATION AS A REGULATORY TAKING.

To prevent "Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole," *Penn Cent. Transp. Co. v. New York City*, 438 U.S 104, 123 (1978), the Fifth Amendment bars the taking of "private property . . . for public use without just compensation." Central to any successful invocation of the Takings Clause is a showing that property has in fact been taken — either classically, by a physical taking, or by economic regulation that "goes too far." *Agins v. City of Tiburon*, 447 U.S. 255, 260-61 (1980).[3]

When assessing whether there has been a regulatory taking, this Court has repeatedly held that courts should look first to the

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[3] As Justice Stevens observed in *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 329 (1987) (Stevens, J., dissenting, citing *Agins*, *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470 (1987), and *Hodel v. Irving*, 481 U.S. 704 (1987)), "While virtually all physical invasions are deemed takings . . . a regulatory program that adversely affects property values does not constitute a taking unless it destroys a major portion of the property's value." *See also Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393 (1922).

economic impact of the regulation and whether there has been any impact on the plaintiff's investment-backed expectations, since absent a demonstration of some sort of economic loss, there has been no compensable taking. *Penn Cent.*, 438 U.S. 104; *Hodel v. Irving*, 481 U.S. 704 (1987); *Agins*, 447 U.S. at 262. For example, *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 83 (1980), held that a rule of California constitutional law restraining owners of a shopping mall from restricting the public's exercise of free speech within the mall did not amount to an unconstitutional taking where "[t]here is nothing to suggest that preventing appellants from prohibiting this sort of activity will unreasonably impair the value or use of their property as a shopping center."

Similarly, in *Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962), this Court upheld mining regulations against a Takings Clause challenge at the threshold, without applying the full takings analysis or inquiring into just compensation, because plaintiffs had presented "no evidence in the present record which even remotely suggests that prohibition of further mining will reduce the value of the lot in question." In several cases, the Court has found that a property owner who invests in property, knowing the potential limitations on that property, cannot later complain when these potential limitations are subsequently realized. *United States v. Sperry Corp.*, 493 U.S. 52, 60 (1989); *Dames & Moore v. Regan*, 453 U.S. 654, 674 n.6 (1981); *see also Schaper v. Wallace*, 1994 U.S. App. LEXIS 36186 at *3 n.2 (7th Cir. Dec. 21, 1994); *HFH, Ltd. v. Superior Court of Los Angeles County*, 542 P.2d 237, 241 (Cal. 1975), *cert. denied*, 425 U.S. 904 (1976).

Recently, in *Carson Harbor Village Ltd. v. City of Carson*, 37 F.3d 468, 476 (9th Cir. 1994), the Ninth Circuit applied this rule to dismiss a property owner's takings claims where the owner had purchased the property *after* enactment of an allegedly unconstitutional statute:

> A landowner who purchased land after an alleged taking cannot avail himself of the Just

> Compensation Clause because he has suffered no injury. The price paid for the property presumably reflected the market value of the property minus the interests taken. Carson Harbor has no standing to assert facial claims based on the loss of the premium and the loss of the right to dispose of property.

The holding below squarely conflicts with those cases and this fundamental rule. Even though Landlord has been unable to demonstrate any impairment of its investment-backed expectations whatsoever, and even though it cannot have sustained economic loss from impairment of a property right that it never purchased, the Court of Appeals held that no threshold showing of injury was necessary under the Takings Clause:

> In particular, we are satisfied that even if the economic impact aspect of this test (*see Hodel v. Irving*, 481 U.S. 704, 714) were not to be satisfied, that feature alone could not defeat the owner's interests and claims. . . .

Pet. App. 8a. This confuses the threshold requirement in the regulatory takings context of economic impact with the remaining elements of regulatory takings analysis where such threshold injury exists. It ignores the fact that the landlord here, like the plaintiffs in *Connolly v. Pension Benefit Guaranty Corp.*, 475 U.S. 211 (1986), and in *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1027 (1984), did business in a heavily regulated field and "cannot properly object if the legislative scheme is buttressed by subsequent amendments to achieve the legislative end." 467 U.S. at 1018. The Takings Clause does not reach a law or regulation that neither takes property nor results in economic loss of anything to which the landowner has a reasonable expectation, and does not empower courts to proceed to strike such a statute down on substantive due process-like analysis for failing substantially to advance legitimate state interests.

The Court should grant the writ in this case to clarify the rule that, absent a physical taking, in order to seek relief against economic legislation as a regulatory taking under the Takings Clause, a person must have sustained some economic loss.[4]

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[4] Although a portion of the Court of Appeals' decision suggests that Landlord lost its "reversionary" interest in the apartments, Pet. App. 11a-12a, the Court of Appeals expressly declined to decide the case on that ground, and its decision could not be upheld on that basis. First, no court has ever determined whether this "reversionary" interest held any economic value, and the trial court held that there was none:

> As previously discussed, plaintiffs have not shown that they have been deprived of their reversionary interest in the apartments any more so than if the apartments were rented to individuals. There has been no showing that the value of any reversionary interest in a rent-stabilized apartment is substantially less when the tenant is a not-for-profit hospital as opposed to an individual.

Pet. App. 68a.

Second, the record makes clear that Landlord has not "lost" anything it ever had, since when Landlord initially purchased the Building it did not acquire the rights it now complains were taken. Landlord therefore cannot demonstrate that enactment of the OHA has altered its *investment-backed* expectations. At the time of investment, the apartments were already subject to the RSL, Lenox Hill already occupied the apartments, and New York law clearly entitled Lenox Hill to successive lease renewals. *520 E. 81st Street Assocs. v. Lenox Hill Hosp.*, 38 N.Y.2d 525 (1976). That is precisely the position that Landlord is in now. Nor did the four months during which the OHA created a legal ambiguity vest Landlord with any new property interest. As the trial court stated: "The brief period of time between the enactment of the 1983 and 1984 laws was insufficient to give rise to any reasonable expectation of recovering the apartments." Pet. App. 68a. In short, Chapter 940 has not altered Landlord's property rights or "taken" anything it acquired at the time of purchase.

Third, under Chapter 940, Landlord retains its reversionary interest in the apartments. When Lenox Hill vacates an apartment, and it has

(continued...)

II.

STATE AND FEDERAL COURTS ARE CONFLICTED AS TO WHETHER THE "CLOSE CAUSAL NEXUS" TEST OF *DOLAN* APPLIES TO REGULATORY TAKINGS CHALLENGES TO ECONOMIC LEGISLATION.

Last term, in *Dolan v. City of Tigard*, ___ U.S. ___, 114 S. Ct. 2309, 2317 (1994), this Court held that, when challenged under the Takings Clause, administratively imposed permit conditions that require the dedication of property to public use should be tested under a heightened level of scrutiny known as "close causal nexus" review. As part of this test, the Court shifted the burden onto the state to articulate its reasons for imposing permit conditions.

The Court expressly restricted application of the test crafted in *Dolan* to the important but narrow category of cases involving development permits that condition development on the *quid pro quo* of dedicating a part of their land to the public. Distinguishing the traditional regulatory takings analysis from the heightened scrutiny of *Nollan* and *Dolan*, the Court stated that the former set of cases "involved essentially legislative determinations classifying entire areas of the city, whereas here the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel." 114 S. Ct. at 2316.

The Court further noted that *Dolan* involved a physical taking that would plainly require compensation if accomplished directly, and justified application of its standard by the doctrine of unconstitutional conditions. Its new standard applies where (but

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[4](...continued)
already vacated three apartments in the Building, Landlord regains possession. Furthermore, Landlord may regain possession under several procedures under the New York rent regulatory scheme, and retains the right to receive reasonable rents.

only where) the state was using permit conditions to accomplish indirectly what could not be directly achieved:

> [I]n evaluating most generally applicable zoning regulations, the burden properly rests on the party challenging . . . the regulation of property rights . . . Here, by contrast, the city made an adjudicative decision to condition petitioner's application for a building permit on an individual parcel.

114 S. Ct. 2320 n.8 (citation omitted); *see also id.* at 2317.

Despite this Court's apparent restriction of the new test to adjudicative imposition of permit conditions effecting physical takings, the circuit and highest state courts disagree over whether *Dolan* should be limited to cases challenging permit conditions. *Compare Waters Landing Ltd. Partnership v. Montgomery County*, 1994 Md. LEXIS 157 (Md. Dec. 16, 1994)(refusing to apply *Dolan* to legislative enactment); *Parking Ass'n v. City of Atlanta*, 450 S.E.2d 200 (Ga. 1994) (same); *and Carson Harbor Village*, 37 F.3d at 473 (applying traditional substantial advancement test to legislative enactment, without consideration of the heightened *Dolan* test) *with* this case *and Peterman v. Dep't of Natural Resources*, 521 N.W.2d 499 (Mich. 1994) (applying essential nexus test outside the permit application context).

Manocherian is a decidedly striking example of the confusion courts have had applying *Dolan*, and therefore is particularly appropriate for review by the Supreme Court. The New York Court of Appeals expressly relied on *Dolan*'s "close causal nexus" test to invalidate Chapter 940, even though Chapter 940 does not involve administrative adjudication, a physical taking, or any ad hoc administrative imposition of permit conditions. Furthermore, just as the heightened *Dolan* scrutiny requires agencies to explain the purpose behind the conditions they place on permits, the Court in *Manocherian* now requires the state legislature to state its legislative purpose expressly in any

enactment that could conceivably be challenged under the Takings Clause: "Part of the underpinning of the Hospital's and State's claim in this case rests on a belated assertion of a health care crisis in the City of New York. *The Legislature declared no crisis in enacting this privileged exception.*" Pet. App. 13a (emphasis added). Condemning Chapter 940 for that reason conflicts not only with the accepted analysis of "legitimate state interests," *infra*, pp. 18-21, but also with the limitations set forth in *Dolan*.

The Court should take this opportunity to resolve this conflict among the nation's courts and clarify the extent to which the *Dolan* test applies in takings cases challenging statutory economic regulation.

III.

THE NEW YORK COURT'S INVALIDATION OF A STATE STATUTE AS A REGULATORY TAKING FOR NOT "SUBSTANTIALLY ADVANCING A LEGITIMATE STATE INTEREST" IS IN CONFLICT WITH DECISIONS CAREFULLY NARROWING JUDICIAL POWER TO STRIKE DOWN DULY ENACTED LEGISLATION AND RESURRECTS THE DISCREDITED *LOCHNER* DOCTRINE

What is a "legitimate state interest" and how courts should assess whether a statute furthers one are questions on which, as was noted in *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987), this Court has not previously elaborated.

To the extent that this Court has commented at all on the issue, its views are squarely opposed to the Court of Appeals' approach, and suggest that the judicial role in assessing the legitimacy of governmental purpose is no greater in the takings context than when economic legislation is challenged on substantive due process or equal protection grounds where no suspect class is involved. As Justice Stevens wrote for the Court in *Keystone*

Bituminous Coal Ass'n v. DeBenedictis, 480 U.S. 470, 487 n.16 (1987):

> We do not suggest that courts have "a license to judge the effectiveness of legislation," [*quoting* Rehnquist, C.J. dissenting, at 511 n.3], or that courts are to undertake "least restrictive alternative" analysis in deciding whether a state regulatory scheme is designed to remedy a public harm or is instead intended to provide private benefits. That a land use regulation may be somewhat overinclusive or underinclusive is, of course, no justification for rejecting it. *See Euclid v. Ambler Realty Co.*, 272 U.S. 365, 388-89 (1926).

Similarly, in related contexts, this Court has repeatedly emphasized the extremely narrow role for courts in deciding whether legislation serves a legitimate state interest, which places the Court of Appeals' approach in substantial doubt. *See, e.g., Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1014 (1984) ("[t]he role of the courts in second-guessing the legislature's judgment of what constitutes a public use is extremely narrow"); *National R.R. Passenger Corp v. Boston & Maine Corp.*, 503 U.S. 407, (1992) (same).

The *Manocherian* decision is sharply at odds with these settled rules, and unless reversed may well launch lower courts on precisely the *Lochner*ian enterprise that the Court took pains to terminate more than fifty years ago, this time under the sail of the Takings Clause.

"A broad range of governmental purposes and regulations" may constitute a legitimate interest. *Nollan*, 483 U.S. at 834-35. Here, however, the Court of Appeals approached its inquiry with an evident hostility to the legislation, rather than with the presumption of constitutionality that should have attended its inquiry. *See, e.g., Hodel v. Indiana*, 452 U.S. 314, 331-32 (1981). It hastily rejected a host of proffered state interests for

Chapter 940, including the need for affordable staff housing proximate to city hospitals, and the need to protect not-for-profit hospitals from the same market dysfunctions that affect private individuals in the market for sparse New York City housing. Pet. App. 10a.

In fact, as Judge Levine's dissent carefully showed (Pet. App. 25a-29a), the interests served by Chapter 940 are apparent from the statutory text and way the statute is designed to operate. The legislature having decided that it preferred permitting not-for-profit hospitals to lease rent-stabilized apartments for use by their employees, rather than to have these apartments surrendered by the hospitals and made generally available for the population at large, with the consequent added difficulty for new hospital employees to find apartments nearby those hospitals, its choice should have been honored, not condemned. The legitimacy of that choice under applicable precedent is plain, even if the judges would have decided differently had they been legislators.

The Court of Appeals also applied the wrong standard in requiring that Chapter 940 "substantially advance" the interests of the underlying rent stabilization scheme to which it relates. Pet. App. 13a. The long-authorized appropriate inquiry is whether the challenged measure furthered conceivable legitimate state interests underlying that measure itself, not whether it served precisely the same goals as the underlying legislation to which it relates.[5] The correct approach, repeatedly reflected in

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[5] For example, in *Pennell v. City of San Jose*, 485 U.S. 1, 12-13 (1988), this Court held that "alleviat[ing] tenant hardship" is a legitimate state interest sufficient to justify a section of a rent control ordinance, even if the ordinance as a whole was not designed for that purpose. *See also Regan v. Wald*, 468 U.S. 222, 243-44 (1984) (upholding statutory amendment against due process challenge by analyzing legislative purpose of the amendment independent of the statutory purpose as a whole).

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this Court's cases, is the one taken by Judge Levine's dissent, which asked what interest the Legislature "could" have been acting to further (Pet. App. 27a-28a), an approach that could not be further from that taken by the majority. Pet. App. 9a-12a.[6]

The Court of Appeals' incursion into the legislative domain appeared to result from its perception that *Nollan* and *Dolan* had substantially expanded the role for searching judicial scrutiny in

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[5](...continued)

Of course, it is hard to see how Chapter 940 could have been found at odds with the underlying rent stabilization scheme under any conceivable test, when it simply effected a technical correction to the OHA, itself an amendment to the RSL, to assure that the OHA did not inadvertently change fifteen years of prior treatment of those apartments under the RSL.

[6] The state court also erred in refusing to consider the state interest advanced by the State in the course of the litigation (protecting not-for-profit hospitals, like individuals, from the "speculative" and "disruptive" rents resulting from a market imbalance), an interest which was equally apparent from the face of the legislation (as well as from the official legislative history properly relied on under state law). In so doing, the Court contravened the longstanding rule that a legitimate state interest need not be asserted within the statute. *E.g.*, *F.C.C. v. Beach Communications, Inc.*, ___ U.S. ___, 113 S. Ct. 2096, 2102 (1993)("we never require a legislature to articulate its reasons for enacting a statute"); *Nordlinger v. Hahn*, ___ U.S. ___, 112 S. Ct. 2326, 2332-34 (1992)(same); *Ruckelshaus*, 467 U.S. at 1014 (same); *Woods v. Cloyd W. Miller Co.*, 333 U.S. 138, 144 (1948)(same). Indeed, the state may advance an interest at any time in the litigation. *E.g.*, *Beach Communications, Inc.*, 113 S. Ct. at 2102; *Nordlinger*, 113 S. Ct. at 2334; *Hawaii Housing Auth. v. Midkiff*, 467 U.S. 229, 233 (1984). *See also Mountain Water Co. v. Montana Dep't of Pub. Serv. Regulation*, 919 F.2d 593, 597 (9th Cir. 1990)("[i]n our review of governmental purposes . . . we need not rely only upon those purposes the legislature, litigants or district court have espoused, but may also consider any other rational purposes possibly motivating enactment of the challenged statute.").

all takings cases, including when economic legislation is challenged as a regulatory taking. That likelihood, and the invalidation of rent regulation legislation on nothing more than *Lochner*-like findings of illegitimacy based on simple disagreement with the legislature's constitutionally protected choice, suggest an important need for review here. The Court should take this opportunity to answer the question it left unanswered in *Nollan* and make clear that "legitimate state interest" analysis does not license the courts to declare unconstitutional laws they dislike.

IV.

THE NEW YORK COURT'S INVALIDATION OF A STATE STATUTE AS A REGULATORY TAKING WITHOUT INQUIRY INTO WHETHER COMPENSATION AFFORDED THE LANDOWNER CONSTITUTED JUST COMPENSATION CONFLICTS WITH NUMEROUS DECISIONS OF THIS COURT.

This Court has repeatedly held that no takings case can be decided without addressing both the precise nature of what has been taken (the "taking" part of the inquiry) and the further issue of whether the government has afforded just compensation for what was in fact taken (the "just compensation" inquiry). *First English Evangelical Lutheran Church v. County of Los Angeles*, 482 U.S. 304, 314 (1987); *MacDonald, Sommer & Frates v. County of Yolo*, 477 U.S. 340 (1986); *San Diego Gas & Elec. Co. v. San Diego*, 450 U.S. 621 (1981); *Agins v. City of Tiburon*, 447 U.S. 255, 263 (1980). By finding its work done after addressing the "taking" issue without inquiring whether the property owner had been vouchsafed "just compensation" by the enhanced rent increased provided by Chapter 940, the New York Court of Appeals failed to follow those decisions. In so doing, its decision replaces Takings Clause jurisprudence with the broad-ranging substantive due process review that has been prohibited since the *Lochner* era closed in 1937. *E.g.*, *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *United States v. Darby*, 312 U.S. 100 (1941).

This Court has repeatedly refused to strike down rent regulation under the Takings Clause.[7] Yet here, the state court invalidated a specialized rent control statute as not substantially advancing a legitimate purpose without the slightest inquiry into whether the additional rent increases that measure afforded the landlord (over and above available rents had the leases been held by the nurses residing in the apartments, rather than by Lenox Hill) amounted to just compensation.[8] By stopping at that point, the court ensured that its inquiry would be essentially indistinguishable from the substantive due process analysis of *Lochner*.

Except in the theoretical (but largely empty) category of takings cases where legislation may be struck down as not having any public purpose (and the Court of Appeals' decision did not rest on such a finding),[9] there *is* no violation under the Takings Clause if the landowner whose property is "taken" is afforded just compensation. *See, e.g., MacDonald, Sommer & Frates*, 477 U.S. at 350; *San Diego Gas & Elec.*, 450 U.S. at 632.

Lenox Hill asserted below that even assuming *arguendo* that Chapter 940 constituted a sufficient impairment of the landlord's interest to warrant consideration of the just compensation issue — as the statutes at issue in *Penn Cent.*, 438 U.S. at 124, *Ruckelshaus*, 467 U.S. at 986, 1006, and *Hodel v. Virginia*

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[7] *See, e.g., Yee v. City of Escondido*, 503 U.S. 519 (1992); *Pennell v. City of San Jose*, 485 U.S. 1, 12 n.6 (1988); *Bowles v. Willingham*, 321 U.S. 503 (1944).

[8] *See* pp. 8-9, *supra*.

[9] The Fifth Amendment provides that "private property may not be taken for *public use* without just compensation." (emphasis added). Enforcement of that standard is broadly deferential: "where the exercise of the eminent domain power is rationally related to a conceivable public purpose, the Court has never held a compensated taking to be proscribed by the Public Use Clause." *Hawaii Housing Auth.*, 467 U.S. at 241.

Surface Mining & Reclamation Ass'n, 452 U.S. 264, 296-97 (1981), did not — the legislation nevertheless afforded the landlord just compensation. The Court of Appeals' invalidation of the statute under the Takings Clause without even considering that issue sharply conflicts with *Agins* and its progeny. Whether a statute can be invalidated as a regulatory taking without consideration of the just compensation issue is a question fully warranting this Court's review.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

EDWARD S. KORNREICH, ESQ.
Counsel of Record
CHARLES S. SIMS, ESQ.
MARK P. MONACK, ESQ.
Proskauer Rose Goetz &
Mendelsohn LLP
1585 Broadway
New York, New York 10036
(212) 969-3000

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